Office-Supreme Court, U.S.
FILED
JUL 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1436

In the Supreme Court of the United States

OCTOBER TERM, 1980

MALCOLM BALDRIGE, SECRETARY OF COMMERCE AND DANIEL B. LEVINE, ACTING DIRECTOR, BUREAU OF THE CENSUS, PETITIONERS

v.

PETER SHAPIRO, ESSEX COUNTY EXECUTIVE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

LAWRENCE G. WALLACE
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

LEONARD SCHAITMAN
MICHAEL KIMMEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether lists of addresses collected and utilized by the Bureau of the Census in fulfilling its duties under the Census Act, 13 U.S.C. 1 *et seq.*, are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	3
Summary of argument	6
Argument:	
Address lists compiled by the Bureau of the Census are exempt from disclosure under Exemption 3 of the Freedom of Information Act and the relevant census statutes	10
A. Introduction	10
B. The census laws constitute Exemption 3 statutes	13
C. Census Bureau address lists are within the confidentiality mandate of the Census Act	19
D. Respondent's claimed right of access under the FOIA to raw census data is "neither increased nor decreased" by reason of his interest in challenging the census count for Essex County	38
Conclusion	45

TABLE OF AUTHORITIES

Cases: Page

Administrator, FAA v. *Robertson*, 422 U.S. 255 17
American Textile Manufacturers Institute v. *Donovan*, No. 79-1429 (June 17, 1981) 19
Carey v. *Klutznick*, No. 81-6042 (2d Cir. June 12, 1981) 11, 16, 27, 37, 41
CBS, Inc. v. *FCC*, No. 80-207 (July 1, 1981) 19, 30
Columbia Packing Co. v. *United States Department of Agriculture*, 563 F.2d 495 40
Cooper v. *Department of the Navy*, 558 F.2d 274.... 40
CPSC v. *GTE Sylvania, Inc.*, 447 U.S. 102 .....14, 18, 44
Department of Air Force v. *Rose*, 425 U.S. 352..... 35
Diamond v. *Chakrabarty*, 447 U.S. 303 45
EPA v. *Mink*, 410 U.S. 73 ..... 16, 40
FOMC v. *Merrill*, 443 U.S. 340 ..... 14, 40
Forsham v. *Califano*, 587 F.2d 1128, aff'd, 445 U.S. 169 40
Forsham v. *Harris*, 445 U.S. 169 13
FTC v. *Dilger*, 276 F.2d 739, cert. denied, 364 U.S. 882 34
Getman v. *NLRB*, 450 F.2d 670 44
GTE Sylvania, Inc. v. *Consumers Union of the United States, Inc.*, 445 U.S. 375 13
Heathman v. *United States District Court*, 503 F.2d 1032 28
Kissinger v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136 ..... 13, 44
LaMorte v. *Mansfield*, 438 F.2d 448 34
McNichols v. *Baldrige*, cert. granted, No. 80-1781 (June 15, 1981) 13
McNichols v. *Klutznick*, 644 F.2d 844, cert. granted, No. 80-1781 (June 15, 1981) 7, 15-16, 23, 24, 34, 36, 41, 43
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 30
NLRB v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 40
NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 .....9, 39, 40
Renegotiation Board v. *Bannercraft Clothing Co.*, 415 U.S. 1 44

Cases (continued): Page

Seymour v. *Barabba*, 559 F.2d 806 ..... 7, 15, 16, 22, 25
St. Regis Paper Co. v. *United States*, 368 U.S. 208 ..... 27, 28, 33-34
Sterling Drug, Inc. v. *FTC*, 450 F.2d 698 40
TVA v. *Hill*, 437 U.S. 153 45
United States v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 ..... 11-12, 16, 34
United States v. *Dionisio*, 410 U.S. 1 35
Upjohn Co. v. *United States*, No. 79-886 (Jan. 13, 1981) 36
United States v. *Little*, 321 F.2d 388 11
United States v. *Moriarity*, 106 F. 886 12
United States v. *Rickenbacker*, 309 F.2d 462, cert. denied, 371 U.S. 962 11
United States v. *Rutherford*, 442 U.S. 544 45

Constitution, statutes, and rule:

United States Constitution:
Article I, Section 2 10
Fourteenth Amendment, Section 2 11
Sixteenth Amendment 11
Act of Mar. 1, 1790, ch. 2, Section 7, 1 Stat. 103 26
Act of Feb. 28, 1800, ch. 12, Section 7, 2 Stat. 13 26
Act of Mar. 26, 1810, ch. 17, Section 7, 2 Stat. 567-568 26
Act of Mar. 14, 1820, ch. 24, Section 7, 3 Stat 552 26
Act of Mar. 3, 1879, ch. 195, Section 7, 20 Stat. 475 26
Act of Mar. 1, 1889, ch. 319, Section 8, 25 Stat. 763 26
Act of Mar. 3, 1899, ch. 419, 30 Stat. 1014 *et seq.*:
Section 7, 30 Stat. 1015 26
Section 18, 30 Stat. 1019 26
Section 21, 30 Stat. 1020 26
Act of July 2, 1909, ch. 2, Section 25, 36 Stat. 9.. 26
Act of Apr. 2, 1924, ch. 80, Section 3, 43 Stat. 31 27

Constitution, statutes, and rule (continued): Page

Act of June 18, 1929, ch. 28, 46 Stat. 21 *et seq.*:
Section 8, 46 Stat. 23 27
Section 21, 46 Stat. 26 27
Act of July 25, 1947, ch. 331, Section 3, 61 Stat. 458 27
Act of Aug. 31, 1954, ch. 1158, 68 Stat. 1013-1014 27
Act of Oct. 15, 1962, Pub. L. No. 87-813, 76 Stat. 922 27
Act of Oct. 17, 1976, Pub. L. No. 94-521, Section 6, 90 Stat. 2460 29
Administrative Procedure Act, 5 U.S.C. (1964 ed.) 1001 *et seq.*:
Section 3, 5 U.S.C. (1964 ed.) 1002 16
Section 3(c), 5 U.S.C. (1964 ed.) 1002(c) .. 39
Census Act, 13 U.S.C. 1 *et seq.* 11
13 U.S.C. 1(3) 2
13 U.S.C. 6 12
13 U.S.C. 6(c) 25
13 U.S.C. 8 29
13 U.S.C. 8(a) 32, 37
13 U.S.C. 8(b) ..... *passim*
13 U.S.C. 8(c) 37
13 U.S.C. 9 ..... 14, 16, 20, 43
13 U.S.C. 9(a) ..... *passim*
13 U.S.C. 9(a)(1) 8, 21, 22, 23
13 U.S.C. 9(a)(2) 21
13 U.S.C. 21 3
13 U.S.C. 23(c) 6, 20, 43, 44
13 U.S.C. 41 11
13 U.S.C. 61 11
13 U.S.C. 131 11
13 U.S.C. 141 ..... 3, 11
13 U.S.C. 142 11
13 U.S.C. 161 11
13 U.S.C. 182 12
13 U.S.C. 214 ..... 14, 20, 43
13 U.S.C. 221 12
13 U.S.C. 223 12

Constitution, statutes, and rule (continued): Page

13 U.S.C. 224 12
13 U.S.C. 225(c) 12
Freedom of Information Act, 5 U.S.C. 552 4
5 U.S.C. 552(a)(3) 39
5 U.S.C. 552(a)(4)(B) 13
5 U.S.C. 552(b) 13-14, 38, 39
5 U.S.C. 552(b)(3) ..... *passim*
5 U.S.C. 552(b)(3)(A) 15, 18, 19
5 U.S.C. 552(b)(6) 35
Government in the Sunshine Act, Pub. L. No. 94-409, Section 5(b), 90 Stat. 1247 18
Privacy Act of 1974, 5 U.S.C. 552a 9, 31
5 U.S.C. 552a(a)(6) 32
5 U.S.C. 552a(b)(4) 32
5 U.S.C. 552a(k)(4) 32
43 Stat. 3012 31
5 U.S.C. 701(a)(2) 44
Fed. R. Civ. P. 26(b) 41

Miscellaneous:

104 Cong. Rec. (1958):
pp. 6548-6550 16
p. 6550 16
112 Cong. Rec. 13646 (1966) 17
120 Cong. Rec. 40884 (1974) 31
122 Cong. Rec. 24211 (1976) 18
K. Davis, *Administrative Law Treatise* (Supp. 1970) 39
45 Fed. Reg. 82125-82126 (1980) 32
Freedom of Information and Secrecy in Government: Hearing on S. 921 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 85th Cong., 2d Sess., Pt. 2 (1958) 16
Freedom of Information: Hearings on S. 1666 and S. 1663 (in part) Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. (1963) 17

Miscellaneous (continued): Page

H.R. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. (1976) 18
H.R. Conf. Rep. No. 94-1719, 94th Cong., 2d Sess. (1976) 12, 29
H.R. Rep. No. 960, 60th Cong., 1st Sess. (1908) .. 12, 22, 26, 30, 34
H.R. Rep. No. 1980, 83d Cong., 2d Sess. (1954) .. 27
H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966) .. 17, 39
H.R. Rep. No. 93-1416, 93d Cong., 2d Sess. (1974) 29, 32, 33
H.R. Rep. No. 94-880 (Pts. I & II), 94th Cong., 2d Sess. (1976) 18
36 Op. Atty's Gen. 362 (1930) 29, 30, 31
Sale or Distribution of Mailing Lists by Federal Agencies: Hearings on H.R. 8903 and Related Bills Before a Subcomm. of the House Comm. on Government Operations, 92d Cong., 2d Sess. (1972) 9, 31, 33
Special Inquiry on Invasion of Privacy: Hearings Before a Subcomm. of the House Comm. on Government Operations, 89th Cong., 1st Sess., Pt. 1 (1965) 33
S. Misc. Doc. No. 41, 41st Cong., 2d Sess. (1870) .. 26
S. Rep. No. 2497, 83d Cong., 2d Sess. (1954) 27
S. Rep. No. 1621, 85th Cong., 2d Sess. (1958) .. 16
S. Rep. No. 2218, 87th Cong., 2d Sess. (1962) .. 27, 28
S. Rep. No. 813, 89th Cong., 1st Sess. (1965) 17, 39
S. Rep. No. 93-1183, 93d Cong., 2d Sess. (1974) .. 32
S. Rep. No. 94-1256, 94th Cong., 2d Sess. (1976) .. 11, 12, 29, 35

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1436

MALCOLM BALDRIGE, SECRETARY OF COMMERCE AND DANIEL B. LEVINE, ACTING DIRECTOR, BUREAU OF THE CENSUS, PETITIONERS

v.

PETER SHAPIRO, ESSEX COUNTY EXECUTIVE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported. The oral opinion of the district court (Pet. App. 6a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on December 1, 1980. The petition for a writ of certiorari was filed on February 23, 1981, and was granted on April 27, 1981 (J.A. 72). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

Exemption 3 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3), provides:

> [FOIA] does not apply to matters that are—
>
> * * * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]

Section 8(b) of the Census Act, 13 U.S.C. 8(b), provides in pertinent part:

> Subject to the limitations contained in sections 6(c) and 9 of this title, the Secretary [of Commerce] may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent * * *.

Section 9(a) of the Census Act, 13 U.S.C. 9(a), provides in pertinent part:

> Neither the Secretary [of Commerce], nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

STATEMENT

1. The Secretary of Commerce is charged by statute with conducting a decennial census of population (13 U.S.C. 141), and he has delegated this function to the Bureau of the Census (13 U.S.C. 21). In the course of carrying out its duties in connection with the 1980 decennial census, the Census Bureau compiled master address registers for each of some 300,000 enumeration districts in the country.[1] The Bureau's master address registers are maintained in the form of bound books systematically listing, *inter alia*, addresses for each dwelling unit, householders' names, number of housing units at the street address, type of census inquiry, Bureau serial number, number of persons in each unit, and, where applicable, the vacant status of the unit (J.A. 51). The list of addresses included in the master address register was compiled from commercial mailing address lists, census postal checks, pre-enumeration canvassing by census personnel, and direct responses to census questionnaires and to interviews conducted by census personnel during the census enumeration process. In some cases, the 1980 lists were also cross-checked against 1970 census data. See generally the affidavit of William Hill (J.A. 67-69).

In order to maximize the accuracy of the 1980 census, the Census Bureau developed a Local Review Program to afford local government officials an op-

[1] An "enumeration district" is a small geographical area established by the Census Bureau as a basic unit for data collection and tabulation (J.A. 33-34, 49).

portunity to review and comment on the Bureau's population and housing tabulations before those figures became final (J.A. 59-63). See the Bureau's Revised Local Review Program Information Booklet (April 1980) (J.A. 22-48). Accordingly, in August and September 1980, the Census Bureau supplied Essex County, New Jersey ("the county") and its subdivisions with the Bureau's "working figures" (J.A. 64). Under the local review program, the county had 10 working days to submit any data demonstrating inaccuracies or other problems with the Bureau's figures (J.A. 63-65).[2] Prior to its receipt of the Bureau's working figures, the county unsuccessfully sought to obtain the Bureau's list of residential addresses within the county for the alleged purpose of facilitating the county's participation in the local review program (J.A. 11-13).[3]

2. Thereafter, on August 12, 1980, respondent, the Essex County Executive, filed this suit under the Freedom of Information Act (FOIA), 5 U.S.C. 552, in the United States District Court for the District of New Jersey, seeking disclosure of the Census

---

[2] The Bureau provided the county with aggregate information for each enumeration district, including the number of housing units, the number of vacant housing units, population totals and population per household totals (J.A. 64-65). The county was afforded the opportunity to analyze the census data in light of data available to the county and to identify suspected discrepancies at the enumeration district level (J.A. 27-29, 57, 63-64).

[3] The county claimed that it needed the Bureau's address list in order to determine whether the Bureau had succeeded in identifying each potential housing site in the county (J.A. 9). The Bureau denied the county's request on the ground that the census laws barred disclosure of the address list (J.A. 11).

Bureau's address list for Essex County (J.A. 1, 7-10). Respondent alleged that he intended to use these addresses to participate in the local review program and to assure the accuracy of the 1980 figures for Essex County (J.A. 9; Pet. App. 6a-8a, 10a-12a).[4] The Bureau resisted disclosure, claiming that the Census Act, specifically 13 U.S.C. 8(b) and 9(a), prohibits disclosure of all raw census data relating to particular individuals, including addresses, and that therefore the information sought by respondent was "specifically exempted from disclosure by statute" under Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3).

On August 27, 1980, the district court rejected the government's claim of exemption and granted respondent's motion for summary judgment (Pet. App. 6a-13a, 16a-17a). In an oral opinion, the district court held that 13 U.S.C. 8(b) and 9(a) "d[o] not provide a blanket of confidentiality for any and all census materials; instead, the confidentiality requirement is structured solely to require that census material be used in furtherance of the Bureau's statistical mission and to ensure against disclosure of any particular individual's response" (Pet. App. 9a-10a). Because respondent allegedly intended to use the census data in order to participate in the local review program, the court concluded that the address list was not confidential, at least with regard to

---

[4] Shortly after the commencement of this action, respondent participated to a limited extent in the local review program (J.A. 66). On August 15, 1980, respondent sent a letter to the Census Bureau identifying five enumeration districts as to which the Bureau's data were believed to be inaccurate. After recanvassing those areas the Bureau added 45 persons to the count. Various other localities in Essex County also participated in the local review program (J.A. 65-66).

respondent. In addition, the district court observed that the address data sought by respondent are "not derived from the questionnaires received, but rather, data available prior to the commencement of the census process" (*id.* at 12a-13a).

In its judgment entered on August 29, 1980, the district court ordered petitioners to turn over the address list to respondent and his agents, but only after swearing such persons to observe the confidentiality requirements of the Census Act, in accordance with 13 U.S.C. 23(c) (Pet. App. 16a-17a). The court further directed petitioners to consider any data submitted by respondent within 10 working days of his obtaining the address lists (*id.* at 17a). Finally, the district court stayed its order pending appeal (*id.* at 18a).

On appeal, the court of appeals summarily affirmed "for the reasons stated by the district court" (Pet. App. 2a).[5]

SUMMARY OF ARGUMENT

The district court's order, summarily affirmed by the court of appeals, grants respondent's request under the Freedom of Information Act (FOIA) for disclosure of the Census Bureau's master address register for Essex County. This order is improper. The confidentiality provisions of the Census Act, 13 U.S.C. 8(b) and 9(a), constitute withholding statutes

---

[5] The court of appeals agreed to stay the district court's order until December 8, 1980 (Pet. App. 2a). In the interim, the government sought a stay of the district court's order from this Court. On December 4, 1980, Justice Brennan granted a stay pending further order (No. A-490). On December 15, 1980, the Court, with two Justices dissenting, continued the stay pending the timely filing and final disposition of a petition for a writ of certiorari.

within the meaning of Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3), and the Bureau's address lists are subject to the prohibitions against disclosure in Sections 8(b) and 9(a). Hence, the address lists are exempt from public disclosure under the FOIA.

1. The confidentiality provisions of the Census Act, 13 U.S.C. 8(b) and 9(a), satisfy the criteria of Exemption 3 of the FOIA. Section 9(a) of the Census Act expressly prohibits the Secretary of Commerce and his agents from using census information for nonstatistical purposes, from publishing census data in a manner that could identify information furnished by a particular individual, and from permitting anyone other than sworn Census Bureau personnel to examine the individual reports. Section 8(b) of the Act authorizes the Secretary to publish aggregate statistical tabulations, but that authority is made expressly subject to the restrictions in Section 9 and to the additional limitation that the Secretary may not "disclose the information reported by, or on behalf of, any particular respondent * * *." 13 U.S.C. 8(b). As respondent has conceded, these provisions qualify as Exemption 3 statutes because they "leave no discretion" in the Census Bureau to disclose information relating to particular individuals. See *Seymour* v. *Barabba*, 559 F.2d 806, 807-808 (D.C. Cir. 1977); *McNichols* v. *Klutznick*, 644 F.2d 844, 845 (10th Cir. 1981), cert. granted, No. 80-1781 (June 15, 1981). Accordingly, the only question that remains is whether the Census Bureau records subject to respondent's FOIA request are protected from disclosure by the Census Act.

2. The language of Sections 8(b) and 9(a) of the Census Act is clear: those sections prohibit the public disclosure of all raw census data relating to indi-

vidual census respondents. Respondent does not seriously contest this point; rather, he argues that a bare list of addresses does not reveal information about any particular individual. But respondent's premise is flawed. The Bureau's address lists reveal that a particular building is used for residential purposes and disclose the number of dwelling units at each address. Thus, release of this information—which is ordinarily confirmed by census respondents during the enumeration process—could uncover the existence of housing violations and would undermine the purpose of the Act's confidentiality provisions.

The district court erred in concluding that disclosure of the address list is not barred by the Census Act because respondent intended to use the data for "statistical purposes." The release of raw census data to a person outside the Census Bureau in order to facilitate a challenge to the accuracy of the census is not one of the "statistical purposes for which [the data are] supplied," within the meaning of Section 9(a)(1). In any event, even if respondent's proposed use is a proper "statistical purpose" under Section 9(a)(1), disclosure is nevertheless barred by the other confidentiality provisions of the Act.

Furthermore, since 1879, both Congress and the executive officials responsible for conducting the census have repeatedly and uniformly expressed the view that all raw census data, including lists and schedules containing information about an individual person or establishment, must be kept strictly confidential. In 1972, for example, the Census Bureau informed Congress of its position that "addresses * * * collected under [the Census Act] * * * are * * * strictly confidential." *Sale or Distribution of Mailing Lists by Federal Agencies: Hearings on H.R. 8903*

and Related Bills Before a Subcomm. of the House Comm. on Government Operations, 92d Cong., 2d Sess. 212 (1972). Indeed, in enacting legislation such as the Privacy Act of 1974, 5 U.S.C. 552a, Congress has acknowledged and relied on the Bureau's construction of the Census Act. In light of Congress' approval of and acquiescence in the Bureau's position, the courts below should have deferred to the agency's longstanding administrative interpretation.

Finally, important policy considerations militate against a construction of the Census Act that would permit disclosure of the Bureau's address lists. Compilation of accurate census data in a nation as vast and diverse as the United States could not be achieved without wide-spread cooperation among members of every geographical area and racial, ethnic and economic group. In order to encourage public cooperation with and voluntary participation in the census, the Bureau must provide a credible assurance of strict confidentiality with regard to all information relating to individual census respondents. Disclosure of address lists would undermine the public's confidence in the secrecy of census data and would inevitably result in a decline in the candor and cooperation that is essential to the census process.

3. The district court, in granting disclosure, focused on respondent's alleged need for the Bureau's address lists. But respondent's need for the materials is irrelevant to the determination whether they are exempt from disclosure under the FOIA and cannot justify release of exempt records. As this Court has remarked, an FOIA requester's "rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest in the [records] greater than that shared by the average member of the public." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975).

Respondent has in any event failed to show that disclosure is warranted, even if his particular "need" for the materials were pertinent under the FOIA. Although respondent claims that he needs the address lists to participate "meaningfully" in the Bureau's local review program, that program merely permits local governments to submit data to the Bureau; it does not authorize the Bureau to provide raw census data to local governments. Furthermore, numerous local government units, including several within Essex County, were able to participate in the program without the benefit of access to the Bureau's address lists.

In short, regardless of his asserted need, respondent has no greater right of access to the Census Bureau's raw data than has any other member of the public. The district court's unusual protective order, directing that respondent and his agents be "deputized" as sworn officers of the Bureau, merely confirms that proposition. At best, the policy issue raised by the claimed right of access to raw census data by local government officials is one that should be addressed in the first instance by Congress, not by the courts.

ARGUMENT

ADDRESS LISTS COMPILED BY THE BUREAU OF THE CENSUS ARE EXEMPT FROM DISCLOSURE UNDER EXEMPTION 3 OF THE FREEDOM OF INFORMATION ACT AND THE CENSUS STATUTES

A. Introduction

Article I, Section 2 of the Constitution requires that a nationwide census of population be conducted every ten years, "in such Manner as [Congress] shall by Law direct." The basic constitutional purpose of the census is to determine the apportionment of rep-

resentatives among the states. U.S. Const. Art. I, Sec. 2; Fourteenth Amendment, Section 2. See *Carey* v. *Klutznick*, No. 81-6042 (2d Cir. June 12, 1981), slip op. 3719.[6] Beyond this rather limited constitutional role, the present census statutes (13 U.S.C. 1 *et seq.*) are concerned with a wide range of additional subjects and statistical purposes.[7] One of the major functions of census statistics today is to provide information necessary to determine state and local eligibility for federal grant-in-aid benefits that are based on population. See S. Rep. No. 94-1256, 94th Cong., 2d Sess. 1 (1976). Another important purpose of census statistics is to provide data relevant to the drafting of federal legislation. See *United States* v. *Rickenbacker*, 309 F.2d 462, 463 (2d Cir. 1962), cert. denied, 371 U.S. 962 (1963); *United States* v. *Little*, 321 F. Supp. 388, 392 (D. Del. 1971); *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D.

---

[6] As originally adopted, the constitutional mandate of a decennial census had a two-fold purpose. In addition to its role in the process of apportioning representatives, the census also determined the apportionment of direct taxes among the states. Since the adoption of the Sixteenth Amendment in 1913, however, income taxes may be collected "without apportionment among the several States, and without regard to any census or enumeration."

[7] Thus, 13 U.S.C. 131 requires the compilation of censuses of manufacturers, mining and other businesses every 5 years; 13 U.S.C. 141 requires the compilation of censuses on population, housing and other matters relating to population and housing every 10 years and also requires a mid-decade census; 13 U.S.C. 142 requires a census of agriculture every 5 years, and a census of irrigation and drainage every 10 years; 13 U.S.C. 161 requires a census of local governments; and 13 U.S.C. 41 and 61 require the collection and publication of statistics on cotton and oilseeds.

568, 570 (S.D.N.Y. 1958); *United States* v. *Moriarity*, 106 F. 886, 891-892 (S.D.N.Y. 1901).[8]

The Bureau of the Census obtains the underlying information upon which its statistics are based directly from individuals and establishments, as well as from other available sources, including federal agencies, local governments and private persons and agencies. 13 U.S.C. 6.[9] Although most census information obtained directly from individuals and establishments is compelled by law (13 U.S.C. 221, 223, 224),[10] compilation of accurate census data in a country as large and diverse as the United States would be impossible without wide-spread cooperation among members of every geographical area and racial, ethnic and economic group. In order to en-

---

[8] In addition, statistics from census data are essential for all sorts of general and specialized studies of the social and economic development of the nation and its localities, by governments, nonprofit concerns, businesses and individuals. "Business and industry are dependent on census data for market research, plant and distributorship locations, sales opportunities, and manpower availability. Professional, trade, and voluntary organizations rely on census data to develop programs. Universities and research institutions use census data." S. Rep. No. 94-1256, *supra*, at 2.

[9] 13 U.S.C. 6(c) directs the Secretary of Commerce, to the maximum extent feasible, to obtain information from other government agencies and private sources instead of conducting direct inquiries. Congress intended that this authority to obtain information from other sources in lieu of direct inquiries be used "whenever possible in the interest of economy and reducing respondent burden." S. Rep. No. 94-1256, *supra*, at 3; H.R. Conf. Rep. No. 94-1719, 94th Cong., 2d Sess. 10 (1976).

[10] Information requested in census surveys taken more frequently than annually is not compelled. 13 U.S.C. 182, 225(c).

courage public cooperation with and voluntary participation in the census, the Census Act contains broad prohibitions against disclosure by Census Bureau personnel of census information relating to particular individuals or establishments. 13 U.S.C. 8(b), 9(a).

This case involves a Freedom of Information Act request for address lists compiled and used by the Census Bureau in conducting the census. The basic question presented is whether the Bureau's address lists are exempted from disclosure under Exemption 3 of the FOIA and the confidentiality provisions of the Census Act.[11] Because, as we show below, release of this information to the public is prohibited by statute, the judgment of the court below ordering disclosure of the address lists under the FOIA should be reversed.

B. The Census Laws Constitute Exemption 3 Statutes

The Freedom of Information Act establishes that a federal agency may not improperly withhold agency records from public disclosure. See 5 U.S.C. 552(a)(4)(B); *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, 445 U.S. 375, 384 (1980); *Forsham* v. *Harris*, 445 U.S. 169, 177 (1980); *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150 (1980). An agency record may be withheld, however, when the requested material falls within one or more of the nine statutory exemptions set forth in 5 U.S.C.

---

[11] *McNichols* v. *Baldrige*, cert. granted, No. 80-1781 (June 15, 1981), presents the related question whether a plaintiff challenging the census figures for a particular locality is entitled to discovery of the Census Bureau's list of addresses of vacant dwelling units.

552(b). See *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 121 (1980); *FOMC* v. *Merrill*, 443 U.S. 340, 351-352 (1979). This case involves Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3), which provides that an agency need not disclose matters that are "specifically exempted from disclosure by statute * * *, provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

1. As respondent conceded below (Resp. C.A. Br. 10), Sections 8(b) and 9(a) of the Census Act, which govern the confidentiality of census data, unquestionably qualify as Exemption 3 statutes. This is readily apparent from the plain language of those statutes. Cf. *CPSC* v. *GTE Sylvania, Inc.*, *supra*, 447 U.S. at 122. Section 8(b) provides that, although the Secretary of Commerce may publish aggregate statistical tabulations, he may "not disclose the information reported by, or on behalf of, any particular respondent * * *." 13 U.S.C. 8(b). Section 9(a), in turn, imposes additional limitations on the use and publication of census data, specifically prohibiting the Secretary from (1) using information furnished under the Census Act for nonstatistical purposes, (2) publishing census material in a fashion that could identify the data supplied by any particular establishment or individual, and (3) permitting the inspection of census reports by persons other than the sworn personnel of the Bureau. See 13 U.S.C. 9(a).[12]

The clear intention of these provisions is that raw information furnished to the Census Bureau that re-

[12] The Census Act, 13 U.S.C. 214, imposes criminal penalties for violation of the confidentiality provisions of Section 9.

lates to individual persons or establishments is confidential, and may not be disclosed to the public, or to any federal, state or local governmental agency, except as aggregate statistical totals or subtotals. Sections 8(b) and 9(a) of the Act thus fall within category (A) of Exemption 3 because they "leave no discretion" in the Census Bureau to make public information relating to particular individuals or establishments.[13]

This conclusion is supported by the holding of every court that has addressed the issue. In *Seymour* v. *Barabba*, 559 F.2d 806 (D.C. Cir. 1977), the court of appeals focused on the language of Section 9(a)(1), prohibiting use of "the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied," and concluded that "this statute is a clear and strongly worded prohibition against disclosure which would qualify under Exemption 3. It is a flat barrier to disclosure with no exercise of discretion permitted." 559 F.2d at 807-808.[14] The Tenth Circuit similarly observed in *McNichols* v. *Klutznick*,

---

[13] In addition to qualifying under Part (A) of Exemption 3, Sections 8(b) and 9(a) of the Census Act also meet the requirements of the second clause in Part (B) because they "refer[] to particular types of matters to be withheld," *i.e.*, "information reported by, or on behalf of, any particular respondent" (13 U.S.C. 8(b)), "information furnished under the provisions of this title," "data furnished by any particular establishment or individual," and "the individual [census] reports." 13 U.S.C. 9(a). However, because the statute "leaves no discretion" in the agency to disclose to "the public" under Part (A), it is not necessary to determine whether the statute would also qualify under Part (B).

[14] The court in *Seymour* also noted that the statute referred "to the particular type of matter to be withheld." 559 F.2d at 808. See note 13, *supra*.

644 F.2d 844, 845 (1981), cert. granted, No. 80-1781 (June 15, 1981), that "the broad language of the confidentiality provisions of § 9 make[s] abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentality." Accord, *Carey* v. *Klutznick*, *supra*, slip op. 3727 & n.29. See also *United States* v. *Bethlehem Steel Corp.*, *supra*, 21 F.R.D. at 569-570 ("The language of the statute [13 U.S.C. 9] is clear and unambiguous. * * * Congress created a privileged status as to information furnished to the Census Bureau and directed its confidential treatment so as to prevent misuse.").

2. The legislative history of the FOIA leaves no doubt that Congress intended Exemption 3 to preserve the confidentiality of census data. See *Seymour* v. *Barabba*, *supra*, 559 F.2d at 808. Thus, Congress considered "[c]ensus information" (104 Cong. Rec. 6550 (1958) (remarks of Rep. Moss)) to be privileged and confidential under Section 3 of the Administrative Procedure Act, 5 U.S.C. (1964 ed.) 1002, which, as this Court observed in *EPA* v. *Mink*, 410 U.S. 73, 79 (1973), was the predecessor statute to the FOIA. See also S. Rep. No. 1621, 85th Cong., 2d Sess. 9 (1958); 104 Cong. Rec. 6548-6550 (1958) (remarks of Reps. Brown, Meader, and Moss); *Freedom of Information and Secrecy in Government: Hearing on S. 921 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess., Pt. 2, 986, 1001 (1958).

In enacting the FOIA in 1966, Congress completely revised Section 3 of the APA. In doing so, however, Congress manifested its intent to preserve the confidentiality of census materials under Exemption 3. This intent is reflected in the following colloquy be-

tween Representative Moss, a sponsor of the bill and chairman of the committee that reported the bill to the House, and Representative Olsen (112 Cong. Rec. 13646 (1966)):

> Mr. OLSEN of Montana. * * * I do want to ask the gentleman a question with reference to the Bureau of the Census. The Bureau of the Census can only gather the information that it does gather because that information will be held confidential or the sources of information will be held to be confidential. I presume that the provisions on page 5 of the bill under "Exemptions," No. (3), in other words providing that the provisions of this bill shall not be applicable to matters that are "(3) specifically exempted from disclosure by statute;"—that would exempt the Bureau of the Census from this new provision.
>
> Mr. MOSS. That is correct.

See also S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); *Freedom of Information: Hearings on S. 1666 and S. 1663 (in part) Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 6 (1963).

Furthermore, in 1976, Congress amended the FOIA in light of this Court's decision in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975), in order to restrict the scope of Exemption 3.[15] Government in

---

[15] In *Robertson*, the Court concluded that the discretionary nondisclosure provisions of Section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. 1504, constituted an Exemption 3 statute. The 1976 amendment narrowed the scope of Exemption 3 to include any nondisclosure statutes that are nondiscretionary or that specify sufficiently definite criteria

the Sunshine Act, Pub. L. No. 94-409, Section 5(b), 90 Stat. 1247. See *CPSC* v. *GTE Sylvania, Inc.*, *supra*, 447 U.S. at 121-122 n.18; H.R. Rep. No. 94-880, 94th Cong., 2d Sess., Pt. I, 22-23, and Pt. II, 14-15 (1976); H.R. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. 14 (1976). The pertinent legislative debates again reflect the congressional understanding that the Census Act's confidentiality provisions would continue to qualify as Exemption 3 statutes:

> Mr. McCLOSKEY. * * * If a statute, such as the Census Act, requires the Census Administrator to keep all information secret, it will not be subject to disclosure. * * *
>
> * * * * *
>
> Ms. ABZUG. * * * I want to reassure the gentleman * * * that the question of confidentiality of the census * * * statute is protected under our present language [amending Exemption 3] * * *.
>
> * * * * *
>
> Mr. McCLOSKEY. * * * The Census Administrator receives information for which there is a specific requirement in the statute that it be kept secret. We never intended, when a person is required to keep information secret, that suddenly there be a requirement to make it public under the Freedom of Information Act. So if a statute requires that all census information be kept secret, we do not intend that data released under the FOI Act. * * *

122 Cong. Rec. 24211 (1976).

---

for withholding certain kinds of records. As we have shown (see pages 14-16, *supra*), the Census Act establishes a nondiscretionary ban on the disclosure of all census data relating to particular individuals or establishments and hence falls within 5 U.S.C. 552(b)(3)(A).

For these reasons there can be no dispute that Sections 8(b) and 9(a) of the Census Act constitute withholding statutes under Exemption 3 of the FOIA.[16] These statutory provisions "require[] that the matters [within their scope] be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. 552(b)(3)(A). Hence, the sole remaining question is whether the Census Bureau is prohibited by the Census Act from releasing the records requested by respondent.

C. Census Bureau Address Lists Are Within The Confidentiality Mandate Of The Census Act

The language and legislative history of the Census Act make clear that census data relating to individual persons or establishments, including address lists, may not be disclosed to any person or governmental agency outside the Bureau of the Census. Any such release of Census Bureau address lists would erode public confidence in the confidentiality of census data and would thus subvert the legislative goal of securing maximum voluntary cooperation with the census.

1. In determining whether address lists fall within the confidentiality mandate of the Census Act, the starting point of analysis is the language of the statute itself. See, *e.g.*, *CBS, Inc.* v. *FCC*, No. 80-207 (July 1, 1981), slip op. 8; *American Textile Manufacturers Institute* v. *Donovan*, No. 79-1429 (June 17, 1981), slip op. 16. Section 8(b) of the Act states

---

[16] In addition, as outlined below, the history of the Census Act itself shows that for more than 100 years Congress has sought to maintain the strict confidentiality of raw census data. See pages 26-29, *infra*. This history further confirms the status of Sections 8(b) and 9(a) of the Census Act as Exemption 3 statutes.

unequivocally that the Secretary may publish statistical tabulations based on the underlying census data, but may "not disclose the information reported by, or on behalf of, any particular respondent." 13 U.S.C. 8(b). And Section 9(a) confirms that the Secretary and his employees may not (1) "use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied," (2) "make any publication whereby the data furnished by any particular establishment or individual under this title can be identified," or (3) "permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports." 13 U.S.C. 9(a).[17] These sweeping provisions prohibit the disclosure of *all* raw census data relating to individual respondents, including addresses of particular respondents. In other words, under the statutory scheme, only aggregate statistical data may be disclosed to the public, and then only if such disclosure would not reveal information relating to a particular respondent or establishment.

The central thrust of respondent's argument is that disclosure of the Bureau's address lists is not barred by the Census Act because "[a] list of street numbers does not reveal any information about any particular individual" (Br. in Opp. 5). This argument falls of its own weight. Contrary to respondent's assertion, the Bureau address registers are not "simply a list of the numbers that have been assigned * * *

---

[17] All Bureau employees must be sworn to observe the confidentiality provisions of the Act. See 13 U.S.C. 9, 23(c). As noted earlier (see note 12, *supra*), violation of these provisions is subject to substantial criminal penalties. See 13 U.S.C. 214.

to buildings and vacant lots situated along the streets within the jurisdiction of a local government" (Br. in Opp. 6). Rather, the address registers for each enumeration district include the addresses of all buildings in which individuals reside; the registers also contain a separate address listing for each dwelling unit within each such building. Thus, the Bureau's address registers reveal the residential status of each building listed and the number of dwelling units it contains. This is the type of information that is ordinarily confirmed by census respondents in the course of the enumeration process; if disclosed, such information could be used to the detriment of individual respondents (see page 37, *infra*).

The conclusion of the courts below that the Bureau's address lists should be disclosed under the FOIA apparently rests on Section 9(a)(1) of the Census Act. That provision states that Census Bureau personnel may not "use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied." 13 U.S.C. 9(a)(1). The district court's oral opinion, which was summarily affirmed by the court of appeals, suggests that respondent's intended use of the census data is a "statistical purpose[] for which it is supplied" (Pet. App. 8a-13a). But this conclusion ignores the prohibitions against disclosure contained elsewhere in the Act. Even if release of the Bureau's address lists would not violate Section 9(a)(1), it would run afoul of both Section 8(b), which bars disclosure of "information reported by, or on behalf of, any particular respondent," and Section 9(a)(2), which prohibits the publication of census data in a manner that could identify the in-

formation furnished by any particular establishment or individual. Nothing in the language of Section 9(a)(1) suggests that census material that is subject to the prohibitions against disclosure in other parts of the statute may be released merely because the material is to be used for "statistical purposes." Indeed, Section 9(a) is written in the disjunctive and is made expressly subject to the provisions of Section 8. Thus, even assuming that it may be a necessary condition for release of census data that a proposed recipient intends to use the data for "statistical purposes," satisfaction of that single condition is not sufficient to permit release of census data under the Act.

In any event, Section 9(a)(1) plainly limits the use of raw census data to *Bureau* personnel for the *Bureau*'s own statistical purposes, not the statistical purposes of a local governmental official or other person seeking to challenge the accuracy of the census.[18] Release outside the Bureau of raw data relating to individual respondents, for the purpose of facilitating a challenge to census statistics, is not a "statistical purpose[] for which [the data are] supplied," within the meaning of Section 9(a)(1). That section does not, in terms or by implication, authorize *any* public disclosure of raw census data, for any purpose. Section 9(a)(1) is plainly a prohibition, preventing the Census Bureau from using raw data in its possession for any purpose *other than*

---

[18] See H.R. Rep. No. 960, 60th Cong., 1st Sess. 5 (1908), which equates "statistical purposes" with the Bureau's development of "statistical data," and admonishes that only the Bureau's "statistical data" may become general or public information.

the Bureau's statistical purposes, *i.e.*, developing its statistical information. That is hardly the same thing as releasing raw census data to members of the public, or to other agencies of federal, state or local government, to further their statistical purposes. Not only is such release of raw census data not authorized or contemplated by Section 9(a)(1), it is manifestly prohibited by Section 9(a)(1).

This was the effective holding of the District of Columbia Circuit in *Seymour* v. *Barabba*, *supra*, a case involving an FOIA request for disclosure of names and addresses of certain business establishments. Stressing the "emphatically expressed intent of Congress to protect census information" (559 F.2d at 809), the court held that "names and addresses of reporting firms * * * [are] protected under Section 9(a)(1)" (*id.* at 808-809). In reaching this result, the court held that the Secretary's authority to release "statistical" materials under the Census Act is strictly limited by Section 8(b) (*id.* at 809):

> We think the authority of the Secretary * * * to disclose is an authority to disclose numerical statistical data which does not identify any person, corporation, or entity in any way. Totals, perhaps subtotals and divisions by categories, but nevertheless merely numerical figures are within this meaning. Individual names and addresses are not.

Likewise, in *McNichols* v. *Klutznick*, *supra*, local government officials who brought an action challenging the census count for Denver, Colorado, sought discovery of the Census Bureau's list of addresses of allegedly vacant housing units in that city. In rejecting the discovery request, the court of appeals stated: "[W]e do not believe that the statute per-

mits us to conclude that the plaintiffs' intended use constitutes one of the 'statistical purposes for which [the information sought] is supplied.' 13 U.S.C. § 9(a)(1)." 644 F.2d at 846.

Moreover, as we have already pointed out (see pages 21-22, *supra*), any use of census data not prohibited by Section 9(a)(1) is expressly subject to the other prohibitions against disclosure in Section 9(a) and to the flat ban set forth in Section 8(b) regarding the disclosure of any "information reported by, or on behalf of, any particular respondent" to the census. See 13 U.S.C. 9(a) ("except as provided in section 8 of this title"). In ordering release of the address lists, the district court apparently concluded (Pet. App. 12a-13a) that the information sought by respondent is not protected by these sections of the Census Act because the information allegedly was received "prior to the commencement of the census process" and was not "derived from the questionnaires" that were filled out and returned to the Census Bureau by particular respondents. This argument is both legally and factually flawed. To begin with, there is nothing in the language of the Census Act that supports the district court's conclusion that only information obtained in the course of the enumeration process and in response to questionnaires is subject to the confidentiality provisions of the Act. In addition, the district court's holding ignores the fact that the Census Bureau compiles its address registers from a variety of sources, including postal checks, pre-enumeration canvassing by census personnel, and direct inquiries during the enumeration process itself. Even where information concerning particular addresses is initially obtained from sources other than individual respondents, in most cases that information is confirmed by the respon-

dents in their census returns. Accordingly, the master address registers ordered to be disclosed by the district court in fact reflect information "reported by" individual respondents.

Furthermore, and perhaps most important, the release of addresses by the Census Bureau cannot be squared with the unequivocal intent of Congress to assure the public that raw census data will be kept strictly confidential, regardless whether the information was supplied by "sources other than the specific [respondents]." *Seymour* v. *Barabba*, *supra*, 559 F.2d at 808. Section 6(c) of the Act directs the Secretary, to the maximum extent possible, to obtain information from other federal agencies, local governmental entities and private sources, instead of conducting direct inquiries. 13 U.S.C. 6(c). The Census Act defines "respondent" as any corporation, individual, or other organization or entity which "reported" information, "*or on behalf of which information was reported*," in response to a questionnaire, inquiry, or other request of the Bureau. 13 U.S.C. 1(3) (emphasis added). Section 8(b), in turn, permits the release of only those statistical materials "which do not disclose the information reported by, *or on behalf of*, any particular respondent * * *." 13 U.S.C. 8(b) (emphasis added). By expressly applying the confidentiality mandate not only to information "reported by" respondents, but also to information reported "on behalf of" respondents, Congress clearly expressed its desire to protect *all* raw census data pertaining to individual census respondents.

2. The legislative history of the Census Act confirms that the master address registers and any other census information pertaining to individual persons or establishments are not subject to disclosure. The initial census statutes required the public posting of

the actual census schedule of results in each district. See Act of Mar. 1, 1790, ch. 2, Section 7, 1 Stat. 103; Act of Feb. 28, 1800, ch. 12, Section 7, 2 Stat. 13; Act of Mar. 26, 1810, ch. 17, Section 7, 2 Stat. 567-568; Act of Mar. 14, 1820, ch. 24, Section 7, 3 Stat. 552. Subsequently, however, Congress reacted to the public's apparent concern over the general disclosure of census data (see, *e.g.*, S. Misc. Doc. No. 41, 41st Cong., 2d Sess. (1870)), and, in 1879, it directed each enumerator to take an oath "not [to] disclose *any information* contained in the *schedules, lists*, or statements" used in the decennial census. Act of Mar. 3, 1879, ch. 195, Section 7, 20 Stat. 475 (emphasis added). See, *e.g.*, Act of Mar. 1, 1889, ch. 319, Section 8, 25 Stat. 763; Act of Mar. 3, 1899, ch. 419, Sections 7, 18, and 21, 30 Stat. 1015, 1019, 1020.

Since 1879, Congress has repeatedly expressed the view that *all* raw census data, including lists and schedules containing any information about an individual person or establishment, must be kept strictly confidential. Thus, Section 25 of the Act of July 2, 1909, ch. 2, 36 Stat. 9, the predecessor to Section 9(a) of the current Act, provided that "[n]o publication shall be made by the Census Office whereby the data furnished by any particular establishment can be identified, nor shall the Director of the Census permit anyone other than the sworn employees of the Census Office to examine the individual reports." And the House Report accompanying the 1909 version of the Census Act reflected with clarity Congress' understanding that complete confidentiality of "all schedules and other information officially obtained" was essential to the vitality and efficacy of the census. H.R. Rep. No. 960, 60th Cong., 1st Sess. 5 (1908). See also, *e.g.*, *id.* at 23.

In revising and amending the census laws on several occasions since 1909, Congress has continued to preserve and to strengthen the appearance and fact of confidentiality that is essential to the census process. See, *e.g.*, Act of Apr. 2, 1924, ch. 80, Section 3, 43 Stat. 31; Act of June 18, 1929, ch. 28, Sections 8 and 21, 46 Stat. 23, 26; Act of July 25, 1947, ch. 331, Section 3, 61 Stat. 458; Act of Aug. 31, 1954, ch. 1158, 68 Stat. 1013-1014; S. Rep. No. 2497, 83d Cong., 2d Sess. 2, 10 (1954); H.R. Rep. No. 1980, 83d Cong., 2d Sess. 10 (1954). In 1962, for example, Congress promptly overruled this Court's decision in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), which had held that a copy of a census report retained by a business establishment was not immune from judicial process. See Act of Oct. 15, 1952, Pub. L. No. 87-813, 76 Stat. 922. The pertinent Senate Report observed that the amendment was necessary "to clarify[] the intent of the Census Act in order to provide the protection of confidentiality" that is "vital to its effectiveness." S. Rep. No. 2218, 87th Cong., 2d Sess. 2, 4 (1962).[19]

---

[19] Respondent argues (Br. in Opp. 7) that the amendment overruling the decision in *St. Regis* was a narrow one, limited to ensuring the confidentiality of copies of census reports retained by the reporting establishment. See also *Carey* v. *Klutznick*, *supra*, slip op. 3731-3733 (Stewart, J., concurring). But the holding of *St. Regis* was itself extremely narrow. The *St. Regis* decision did not question the statutory obligation of Census Bureau personnel to preserve the confidentiality of census information. Indeed, the Court emphasized that Congress had restricted the use of census information "while in the hands of those persons receiving them, *i.e.*, the government officials." 368 U.S. at 218. See also *id.* at 217 ("the prohibitions against disclosure contained

The history of the 1976 amendment to the Census Act further refutes respondent's contention that the Bureau's master address registers are not covered by

---

in § 9 run * * * against the officials receiving such information * * *."). Despite its narrow holding, the decision in *St. Regis* had "an extremely adverse effect on the Bureau's ability to gather complete and accurate data." *Heathman* v. *United States District Court*, 503 F.2d 1032, 1036 (9th Cir. 1974) (Chambers, J., concurring). This is confirmed by a letter from the Secretary of Commerce to Congress urging that legislation be adopted overruling *St. Regis*. In his letter, the Secretary stated:

> Because of that ruling it is imperative that corrective legislation be enacted to extend the confidentiality of Section 9 to the copies of Census reports retained by respondents. The decision had an extremely adverse effect on Bureau operations, as not only did some companies destroy their file copies, and thus sever reporting continuity, but many companies lost faith in the promises of the Bureau, and the response to surveys has deteriorated. The lack of file copies increases the cost of obtaining statistical information. The lack of confidence and cooperation will reduce the number of voluntary reports and correspondingly will reduce the accuracy of the statistics.
>
> * * * * *
>
> The *St. Regis* decision impaired the working relationship between the Census Bureau and its respondents. Although the confidentiality of the Census Bureau's own files was affirmed, it is also true that respondents had previously been led to believe by the Government that retained copies enjoyed this same confidentiality. Moreover, the decision has interposed an impediment in the statistics-gathering process because respondents who wish to preserve confidentiality must now destroy their file copies of questionnaires. Some now express reluctance to cooperate further in statistical inquiries.

S. Rep. No. 2218, *supra*, at 3, 4.

the confidentiality provisions of the Act. At that time, Congress amended Section 8 "to add further protection of privacy." S. Rep. No. 94-1256, 94th Cong., 2d Sess. 3 (1976). See Act of Oct. 17, 1976, Pub. L. No. 94-521, Section 6, 90 Stat. 2460. The Senate Report explains that Section 8, as amended, "ensures that the authority of the Secretary of Commerce to furnish statistical tabulations or other material to *public* and private *entities* does not extend to any material which *might* disclose information reported by, or on behalf of, any respondent." S. Rep. No. 94-1256, *supra*, at 4 (emphasis added). See H.R. Conf. Rep. No. 94-1719, 94th Cong., 2d Sess. 10-11 (1976). Congress thus did not intend to give public entities such as Essex County any greater right of access to census data than that of any other member of the public.[20] In addition, it is apparent that the master address registers constitute census "material which might disclose information reported by, or on behalf of," individual respondents (see pages 24-25, *supra*). In sum, the legislative history of the Census Act demonstrates that Congress intended to preserve the confidentiality of all raw census data.

3. Even if these affirmative expressions of congressional intent were not so clear, there is additional evidence that the Census Act prohibits the disclosure of raw census information, including address lists. For more than 70 years, officials of the Executive Branch responsible for conducting the census have consistently taken the position before Congress that the confidentiality mandate of the census laws

[20] Indeed, not even other federal agencies, including the FBI, have access to census data such as the master address registers. See H.R. Rep. No. 93-1416, 93d Cong., 2d Sess. 12-13 (1974); 36 Op. Att'y Gen. 362 (1930).

applies to such information, and the legislative record strongly supports the conclusion that Congress has fully concurred in this position. In these circumstances, the courts below should have deferred to the longstanding administrative interpretation of the statute by the agency charged with its execution. See, *e.g.*, *CBS, Inc.* v. *FCC*, *supra*, slip op. 12-15; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

In 1908, Congress acknowledged that "[i]t is the policy of the Census Office to consider all schedules and other information officially obtained as for use exclusively for statistical purposes, and information is given in the confidence that that policy will be observed. The office is not a general information bureau, excepting for purely statistical data." H.R. Rep. No. 960, *supra*, at 5.[21] More recently, in the

[21] The view that raw census data may not be disclosed by Census Bureau officials was reinforced in 1930 by an opinion of the Attorney General in connection with a request that the Census Bureau furnish the Women's Bureau of the Department of Labor "with the names, addresses, occupations, and status of employment" of workers in Rochester, New York. 36 Op. Att'y Gen. 362 (1930). The Attorney General noted that it had been the practice of the Census Bureau "to interpret the law most strictly against furnishing either official or private persons with information that would reveal to another the identity of the individuals to whom it relates." *Id.* at 365. He further pointed out that the Bureau had adhered to its confidentiality mandate to such an extent that "even statistics for a given community are not published when, because of the limited number of industries therein, the possibility exists that interested parties by some computation might succeed in disclosing information respecting a particular establishment or establishments." *Ibid.* In concluding that the Census Bureau need not disclose the names and addresses (and other information pertaining to) workers in

course of legislative hearings that eventually led to adoption of the Privacy Act of 1974, 5 U.S.C. 552a, the Census Bureau specifically informed Congress of its position that individual "names and addresses * * * collected under title 13, United States Code, * * * are * * * strictly confidential." *Sale or Distribution of Mailing Lists by Federal Agencies: Hearings on H.R. 8903 and Related Bills Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess. 212 (1972). See also *id.* at 38, 213. There is no indication in the legislative history of the Privacy Act that Congress did not accept that view.[22] On the contrary, all available evidence strongly suggests that Congress was in agreement with the Bureau's position.

---

the Rochester area, the Attorney General quoted at length from the proclamation of President Hoover after enactment of the then most recent amendment to the census laws (*id.* at 366, quoting from 46 Stat. 3012):

> "The sole purpose of the census is to secure general statistical information regarding the population and resources of the country, and replies are required from individuals only to permit the compilation of such general statistics. No person can be harmed in any way by furnishing the information required. The census has nothing to do with taxation, with military or jury service, with the compulsion of school attendance, with the regulation of immigration or with the enforcement of any national, state or local law or ordinance. There need be no fear that any disclosure will be made regarding any individual person or his affairs. For the due protection of the rights and interests of the persons furnishing information every employee of the Census Bureau is prohibited, under heavy penalty, from disclosing any information which may thus come to his knowledge."

[22] The 1972 hearings are referred to in the legislative history of the Privacy Act. 120 Cong. Rec. 40884 (1974).

Thus, in enacting the Privacy Act, Congress was sufficiently impressed with the general confidentiality mandate already applicable to census information that it exempted "from virtually all requirements of the [Privacy Act]" [23] any system of records "required by statute to be maintained and used solely as statistical records." 5 U.S.C. 552a(k)(4).[24] This exemption, relating primarily to census records, was considered to be justified because of the "very specific procedures and rigorous safeguards applied to them." S. Rep. No. 93-1183, 93d Cong., 2d Sess. 77 (1974).

A similar rationale explains why Congress excepted from the consent requirements of the Privacy Act, 5 U.S.C. 552a(b)(4), the transfer of individual information from other federal agencies to the Census Bureau. The Senate Report explains that such transfers do not interfere with individual privacy because the census "laws prohibit publication of data gathered by the Bureau in identifiable form and strictly govern confidentiality." S. Rep. No. 93-1183, *supra*, at 70. See, *e.g.*, *id.* at 5, 12. The House Report similarly states that "[l]aws relating to the Bureau of the Census are very strict, limiting access to such records only to Census employees * * *."

---

[23] H.R. Rep. No. 93-1416, 93d Cong., 2d Sess. 20 (1974). See 45 Fed. Reg. 82125-82126 (1980).

[24] A statistical record is defined in the Privacy Act as "a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13[.]" 5 U.S.C. 552a(a)(6). As the House Report explained, the latter provision "permits the Census Bureau to furnish transcripts of census records for genealogical and other proper purposes * * *." H.R. Rep. No. 93-1416, *supra*, at 12. See 13 U.S.C. 8(a).

H.R. Rep. No. 93-1416, 93d Cong., 2d Sess. 12 (1974). See, *e.g.*, *id.* at 3, 13, 25. See also *Hearings on H.R. 8903*, *supra*, at 38, 62-63; *Special Inquiry on Invasion of Privacy: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess., Pt. 1, 276, 283, 284-286 (1965). Particularly in view of the administrative interpretation mentioned above, there is nothing in the legislative history of the Privacy Act to suggest that, in making these unequivocal statements, the congressional committees were not referring to *all* information collected by the Census Bureau under the Census Act, including individual addresses.

4. The discussion above demonstrates that Congress intended the confidentiality provisions of the Census Act to be construed so as to protect all raw census data relating to individual respondents. We have also shown that the Bureau's address lists reveal information relating to particular respondents (*e.g.*, the residential status of each building listed and the number of dwelling units in each building). Because release of the Bureau's address lists might uncover instances of illegal occupancy or other violations (see page 37, *infra*), the disclosure ordered by the courts below would wholly undermine the purpose of the Act's confidentiality provisions.

More general policy considerations also militate against a construction of the Census Act that would permit disclosure of the Bureau's master address registers. This Court has recognized that strict confidentiality of census data is essential to ensure public cooperation with and voluntary participation in the census. *St. Regis Paper Co.* v. *United States*,

supra, 368 U.S. at 218. As the court of appeals observed in *McNichols* v. *Klutznick*, *supra*, 644 F.2d at 845, "[t]he government has promised its citizens that census information will be kept confidential. * * * In exchange for and in reliance on this promise, citizens cooperate with the government's census taking efforts relatively free of inhibitions that might otherwise distort their disclosures." See also *LaMorte* v. *Mansfield*, 438 F.2d 448, 452 (2d Cir. 1971) ("[E]ffective operation of the census requires a maximum of voluntary cooperation. In order to promote this, assurances of confidentiality * * * [have] been given * * *.").[25]

Thus, although the protection of personal privacy is an important concern of the confidentiality provi-

---

[25] And see *FTC* v. *Dilger*, 276 F.2d 739, 742 (7th Cir.), cert. denied, 364 U.S. 882 (1960) ("Congress sought to encourage the cooperation of individuals and businesses in furnishing requested information and to that end gave unreserved assurances that no harm would result from compliance; that there need be no fear that disclosures would be made; and that for the protection of the rights and interests of persons furnishing information, severe criminal penalties would be invoked."); *United States* v. *Bethlehem Steel Corp.*, *supra*, 21 F.R.D. at 570 ("[W]hen Congress imposed upon citizens the duty of disclosing information of a confidential and intimate nature, its purpose was to protect those who complied with the command of the statute. Apart from giving assurance to citizens that the integrity of the information would be preserved by the Government, another purpose was to encourage citizens to submit freely all data desired in recognition of its importance in the enactment of laws and other purposes in the national interests."); H.R. Rep. No. 960, *supra*, at 5 ("Protection against promiscuous or general publicity is of vital importance in securing complete and accurate statements * * *.").

sions of the Census Act,[26] unlike other statutes—such as the Privacy Act and Exemption 6 of the FOIA [27]—which are also concerned with preserving individual privacy, *more* than individual privacy interests underlie the prohibition against disclosure of raw census data. Indeed, much information about individuals collected by the Census Bureau is not inherently "private" at all, but is either well known or is readily accessible to other persons through observation or examination of publicly available records (*e.g.*, an individual's name, place of employment, sex, age, address, type of dwelling, members of family, etc.). Cf. *United States* v. *Dionisio*, 410 U.S. 1, 14 (1973). Yet none of this information may be disclosed by the Bureau of the Census, because the Bureau must provide a credible public assurance that it maintains *all* information relating to individuals on a strictly confidential basis, without exception, and that such information will be released, if at all, only as aggregate statistics.

Privacy interests *per se* have never been held to the same strictness. Privacy interests may be weighed and balanced against other interests, such as the public's need to know, on a case-by-case basis.[28] However, the interest in maintaining public confidence in the secrecy of raw census data cannot be compromised by or balanced against other asserted

---

[26] See S. Rep. No. 94-1256, *supra*, at 3-4.

[27] Exemption 6 of the FOIA, 5 U.S.C. 552(b)(6), provides that the FOIA does not apply to matters that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"

[28] See, *e.g.*, *Department of the Air Force* v. *Rose*, 425 U.S. 352, 373 (1976).

interests if the former is to be credibly maintained.[29] Once breached, such confidence may never be recovered. Cf. *Upjohn Co.* v. *United States*, No. 79-886 (Jan. 13, 1981), slip op. 8. Hence, the statutory mandate of confidentiality necessarily encompasses all raw data relating to individual census respondents, including addresses, whether or not such information would qualify for protection under other statutes that are concerned solely with personal privacy.

As respondent has acknowledged (Br. in Opp. 2; Mem. in Opp. to the App. for a Stay at 3 n.*), the Census Bureau's master address registers for Essex County, which the district court ordered disclosed, contain substantial information of a personal nature regarding individual census respondents, including names, number of housing units and persons per household at each address, the vacant or occupied status of each unit, and the manner in which the census information was obtained for a particular address (J.A. 51). See page 3, *supra*. Even if the address registers could readily be redacted to

---

[29] The public interest asserted by respondent is the interest in a verifiably accurate census count. But, as the Tenth Circuit concluded in rejecting a similar argument in *McNichols* v. *Klutznick*, *supra*, 644 F.2d at 845, the initiation of a public challenge to the Bureau's census count cannot be a sufficient basis to warrant a breach in the strict confidentiality mandated by the Census Act. While disclosure in this context might have the short term benefit of assuring a more accurate count in the 1980 decennial census in Essex County, the long term effect would be to reduce the accuracy of future censuses by deterring numerous individuals from cooperating in the census process.

produce a bare list of addresses,[30] disclosure of that list would be contrary to both the letter and the spirit of Sections 8(b) and 9(a). Many addresses are added to the address registers solely as the result of responses by individuals to census inquiries, and the individual responses serve to confirm the accuracy of addresses obtained from other sources. In addition, publication of a list of addresses might reveal various unlawful or untaxed dwellings, *e.g.*, the occupancy of "abandoned" dwellings or the residential use of lofts zoned only for commercial purposes. Accordingly, disclosure of such information, particularly to the local government, would inevitably result in a decline in the candor and cooperation so essential to the census process.[31]

---

[30] The record shows that numerous addresses added to the master address registers prior to and during the 1980 census were not recorded in the Census Bureau's computer files (J.A. 67-69). We have been informed by the Census Bureau that a list of addresses could be culled from the master address registers for Essex County only by copying the thousands of pages constituting the master address registers and by manually redacting the substantial amount of information found over much of each page of the registers.

[31] District Judge Stewart, concurring in *Carey* v. *Klutznick*, *supra*, disputed the majority's interpretation of Sections 8(b) and 9(a) as covering all information or data related to any particular respondent. In concluding that a broad reading of these sections was unnecessary to provide protection to census respondents, Judge Stewart relied on Section 8(c) of the Act, 13 U.S.C. 8(c), which states that information furnished by the Census Bureau under Section 8 may not "be used to the detriment of any respondent or other person to whom the information relates * * *" (see slip op. 3733). This prohibition applies only to disclosures made by the Bureau pursuant to Sections 8(a) and (b) and would not appear to cover releases, as in this case, pursuant to the FOIA. But even if Section 8(c) were construed to include the instant situation, the possi-

The language and legislative history of the Census Act, the histories of the FOIA and Privacy Act, the agency's longstanding administrative interpretation and important policy considerations all persuasively demonstrate that the Census Bureau's lists of addresses—like other information relating to individual respondents that is furnished to the Bureau in the course of taking the census—are within the confidentiality mandate of Sections 8(b) and 9(a) of the Census Act and are therefore specifically exempted from disclosure under Exemption 3 of the FOIA. The FOIA therefore "does not apply" to Census Bureau address lists. 5 U.S.C. 552(b).

D. Respondent's Claimed Right of Access Under The FOIA To Raw Census Data Is "Neither Increased Nor Decreased" By Reason Of His Interest In Challenging The Census Count For Essex County

In ordering disclosure of the Census Bureau's address lists under the FOIA, the district court emphasized respondent's alleged need for the materials to facilitate the participation of Essex County in the Bureau's local review program (see Pet. App. 7a, 10a-12a). But, as respondent himself conceded in the court of appeals (Resp. C.A. Br. 4), respondent's need is irrelevant and cannot justify disclosure of exempt records under the FOIA.[32]

---

bility that a respondent might face the burden of proving that information used against him was tainted undoubtedly would discourage the voluntary release of information to the Census Bureau.

[32] Respondent argued below only that the Bureau's address lists do not come within the confidentiality protections of the Census Act. We have already shown that this argument is without merit.

1. The Freedom of Information Act applies only to agency records that are not exempted from the Act. The FOIA "does not apply" to matters that are exempted under any of the nine exemptions. 5 U.S.C. 552(b). A particular matter or record is either exempted or it is not. If a record is not exempted it may not be "improperly withheld" from "any person" who has requested it. 5 U.S.C. 552(a)(3). If a record is exempted, no person has any right to it under the FOIA. A particular matter or record cannot be both exempted and nonexempted, depending on who the requester is or what his needs or purposes are. The legislative history of the FOIA clearly indicates that the statute is exclusively concerned with access by "the public as a whole" to governmental information, and does not authorize any notion of selective access. S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965).[33]

In *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975) (emphasis added), this Court squarely rejected the argument that a particular requester's alleged need for the materials in question is a relevant criterion in the application of the FOIA's exemptions:

---

[33] In enacting the FOIA, Congress rejected the prior rule, under Section 3(c) of the APA, limiting disclosure of agency records to "persons properly and directly concerned." 5 U.S.C. (1964 ed.) 1002(c). It replaced such restrictions with the general rule of full public disclosure, subject to the nine exemptions, so as to secure "[t]he right of the individual to be able to find out how his Government is operating." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966). See also K. Davis, *Administrative Law Treatise* 171 (Supp. 1970) ("The Act never takes into account the need of the party seeking the disclosure * * *.").

> Sears' rights under the [Freedom of Information] Act are *neither increased nor decreased* by reason of the fact that it claims an interest in the [records] greater than that shared by the the average member of the public. The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants.

See also, *e.g.*, *id.* at 149 n.16; *FOMC* v. *Merrill*, 443 U.S. 340, 362-363 (1979) (an "applicant's need for information is not to be taken into account in determining whether materials are exempt" under FOIA); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 221 (1978) (unless exempted, FOIA requires that records be made available on demand "to any member of the general public"); *EPA* v. *Mink*, 410 U.S. 73, 92 (1973) (FOIA "may be invoked by any member of 'the public'—without a showing of need * * *"); *Forsham* v. *Califano*, 587 F.2d 1128, 1134 (D.C. Cir. 1978) (footnote omitted), aff'd, 445 U.S. 169 (1980) (FOIA secures "the right of any member of the public" to governmental information; "[a]ny showing of need or interest is irrelevant"); *Columbia Packing Co.* v. *United States Department of Agriculture*, 563 F.2d 495, 499 (1st Cir. 1977) ("a party's asserted need for documents in connection with litigation will not affect, one way or the other, a determination of whether disclosure is warranted under FOIA"); *Cooper* v. *Department of the Navy*, 558 F.2d 274, 276 (5th Cir. 1977) (footnote omitted) ("under the FOIA—if anyone can have the desired information everyone can"); *Sterling Drug Inc.* v. *FTC*, 450 F.2d 698, 704-705 (D.C. Cir. 1971) (disclosure under FOIA does not depend "upon the needs of a particular litigant").

In short, respondent's right to disclosure of census data pursuant to the FOIA is no greater than the right of any other member of the public. No different result obtains under Exemption 3 in this regard than under any other exemption. If a particular matter is within the operative scope of a protective statute that qualifies under Exemption 3, the matter is exempted from the FOIA, regardless of an individual requester's alleged needs or purposes. By its terms, the FOIA simply "does not apply" to such records. 5 U.S.C. 552(b). Hence, respondent's own needs or purposes have no bearing on the application of Exemption 3 to the particular information that is the subject of his FOIA request.[34]

2. Even if a particular requester's needs were pertinent in determining whether certain information should be disclosed pursuant to the FOIA, respondent has failed to show that disclosure is warranted here. Respondent alleges that access to the address lists is essential if Essex County is to participate "in a meaningful way" in the local review program created by the Census Bureau to aid in the 1980 decennial census. See J.A. 12. That program, as noted above (see pages 3-4 & note 2, *supra*), permits local governments to submit data in useful form to the Bureau. It does not and could not authorize the Bureau to submit raw census data to the local

---

[34] Compare *McNichols* v. *Klutznick*, *supra*; *Carey* v. *Klutznick*, *supra*. In these cases the courts of appeals rejected requests for discovery of Census Bureau address lists by local officials who had initiated lawsuits challenging the census results for certain localities. If this material is not disclosable in the context of a case in litigation, where the asserted needs of a party seeking disclosure may be relevant (see Fed. R. Civ. P. 26(b)), then it is certainly not disclosable in response to an FOIA request, where an applicant's need for the information is not a factor to be taken into account.

governments. Moreover, the local review program was created not by statute but by the Census Bureau itself, and the program contains no provision for "discovery" to allow local governments more "meaningful" participation than the Bureau has chosen to provide.[35]

In addition, there is no basis for respondent's assertion that the Bureau's address lists are needed to insure "meaningful" participation in the local review program. As part of that program, the Census Bureau pro- ded each local jurisdiction, including Essex County, with aggregate information for each enumeration district, including the number of housing units, the number of vacant units and population totals. The county could have verified the accuracy of the Bureau's preliminary figures by conducting its own surveys in those enumeration districts where the Bureau's figures were believed to be too low. Numerous local government entities, including units within Essex County, were able to participate in the local review program without the benefit of having access to the Bureau's master address registers. At all events, the legislative history of the Census Act clearly shows that, regardless of need, Congress did not intend to confer upon governmental entities such as Essex County any

---

[35] Respondent has also suggested (Br. in Opp. 2) that Essex County "repeatedly offered to make its computerized address data available to the Census Bureau." We are informed that the Bureau has no record of receiving any such offer prior to the commencement of this litigation. In any event, the disorganized list of addresses (compiled from tax records) that respondent belatedly asked the Bureau to compare with its data did not comply with the local review program guidelines and would not have been very useful because tax lists ordinarily do not specify the number of housing units in a given structure (J.A. 56-57, 69-70).

greater right of access to census data than that of any other member of the public (see page 29, *supra*).

The district court nevertheless attempted to circumvent the carefully drawn provisions of the FOIA and the nondisclosure provisions of the Census Act by directing the Census Bureau to "deputize" respondent's employees as sworn officers of the Bureau, pursuant to 13 U.S.C. 23(c) (Pet. App. 13a, 17a).[36] As the Tenth Circuit observed in a similar situation, this provision is a tacit acknowledgment by the district court that its order "constituted an evasion of congressionally mandated confidentiality." *McNichols* v. *Klutznick*, *supra*, 644 F.2d at 845.[37] More-

---

[36] In addition, the district court ordered respondent and his agents not to use or disclose the Bureau's address data to any person for any purpose other than participation in the local review program (Pet. App. 19a). The court also ordered petitioners to reconsider as timely under the local review program any submission by respondent following his inspection of the Bureau's address registers (*id.* at 17a).

[37] If disclosure of the materials within respondent's FOIA request does not violate 13 U.S.C. 9, then the oath requirement imposed by the district court is unnecessary and meaningless. See 13 U.S.C. 214. If disclosure of the materials does violate 13 U.S.C. 9, then release to respondent is barred by Exemption 3 of the FOIA.

Furthermore, the restrictions imposed by the district court upon respondent's use of the census materials (see note 36, *supra*) cannot be reconciled with the court's conclusion that disclosure is permissible because respondent's purpose in seeking the materials is to "aid in the accuracy of the census" (Pet. App. 12a). If respondent's alleged purpose were relevant and sufficient to justify disclosure under the FOIA, then any use of the materials consistent with that purpose presumably should have been allowed. The literal terms of the district court's order, however, would appear to prevent respondent from using the census data to bring an action challenging the accuracy of the Census Bureau's population figures for Essex County.

over, it is doubtful whether the FOIA, which was enacted to permit unfettered public disclosure of non-exempt agency records (see *CPSC* v. *GTE Sylvania, Inc., supra,* 447 U.S. at 108-109), authorized the district court to order such extraordinary relief.[38] See *Kissinger* v. *Reporters Committee for Freedom of the Press, supra,* 445 U.S. at 154. But cf. *Renegotiation Board* v. *Bannercraft Clothing Co.,* 415 U.S. 1, 16-20 (1974); *Getman* v. *NLRB,* 450 F.2d 670 (D.C. Cir. 1971). It is inconceivable, for example, that under the FOIA a district court could order the CIA to "deputize" a member of the public in order to allow limited inspection of national security secrets. Thus, the district court's unusual protective order simply reinforces our contention that respondent, regardless of his asserted need for the information, has no greater right of access under the FOIA to the Census Bureau's raw data than has any other member of the public.

The contrary conclusion of the courts below is not only directly at odds with the language and history of both the FOIA and the Census Act, it is bound to undermine the central goal of the Census Act's confidentiality provisions. If it became general public knowledge that local officials may (and do) exer-

---

[38] Certainly nothing in 13 U.S.C. 23(c) itself provides a proper basis for the district court's order. That section merely authorizes the Secretary to utilize temporary staff, including federal, state and local government employees, as well as employees of private organizations, "to assist the [Census] Bureau in performing the work authorized by [the Census Act]." The section does not empower the Secretary to hire employees to assist local governments in preparing their submissions under the Bureau's local review program, nor does it grant the district courts authority to oversee the Bureau's hiring decisions under Section 23(c), a matter that is undoubtedly committed to agency discretion by law. See 5 U.S.C. 701(a)(2).

cise a legal right under the FOIA to demand and obtain access to raw census data in order to check its accuracy for "statistical" purposes, public confidence in the integrity of census data would be severely jeopardized. The resulting loss of public cooperation in the conduct of the census would far outweigh the alleged benefits that respondent claims will result from recognizing a right of access for local officials. At best, the policy issue raised by the claimed right of access to raw census data by local officials is one that should be addressed in the first instance by Congress, not by the courts. See *Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980); *United States* v. *Rutherford*, 442 U.S. 544, 559 (1979); *TVA* v. *Hill*, 437 U.S. 153, 194 (1978). Under the existing legislative scheme, raw census data relating to individual respondents may not be disclosed. Respondent is therefore not entitled to Census Bureau address lists under the FOIA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

LEONARD SCHAITMAN
MICHAEL KIMMEL
Attorneys

JULY 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 350430 840